IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.5366 OF 2004

Smt.Bhagirathi H.Nakhwa,
since deceased by L.Rs.& Anr. .. Petitioners

versus

G.R. Balkrishna .. Respondent

...

Mr.S.M. Oak for the petitioners.
Mr. A.A. Garge for the respondents.

CORAM : D.G. KARNIK, J
DATED : 9th August 2004.

P.C:-

1. By this Petition, the petitioners challenges the judgement and order dated 7th January 1988 passed by the learned District Judge, Thane allowing the Civil Appeal No.377 of 1985 filed by the

respondent tenant and thereby dismissing the petitioners' suit for possession. A review application bearing no. Miscellaneous Application no.138/90 filed by the petitioner was also rejected by a judgement and order dated 13th September 1990. That order is also impugned in this Petition.

. The facts which are necessary for the purpose of decision of this Writ Petition are stated below:-

2. The petitioners are owners of Chawl property bearing no. Tika no.1, CTS no. 81-B Chandani Koliwada, Thane. The respondent is occupying one room on the ground floor of the said building as a tenant on the monthly rent of Rs.25/- per month. The respondent fell in arrears of rent for a period of nine months from 1st November 1979 to 31st July 1980. Therefore, by a notice to quit dated 29th August 1978 the petitioners terminated the tenancy of the respondent and also called upon him to pay arrears of rent from 1.11.1979 to 31.7.1980. As the respondent did not pay the arrears as demanded by him within a period of one month of the date of receipt of the notice, the petitioners filed a suit

for possession bearing Regular Civil Suit no. 584/81 in the Court of Civil Judge, Jr. Division, Thane. By a judgement and order dated 15th July 1985, the trial Court decreed the suit on the ground of default. An appeal bearing Civil Appeal no.388 of 1985 filed by the respondent-tenant was allowed by the judgement and order dated 7th January 1988. A review petition bearing Misc. Application no.138/90 filed by the petitioners was dismissed by the District Judge on 13th September 1990. These judgements and orders of the District Court are impugned in this Writ Petition.

3. The suit premises were let out to the respondent by Mr. Hari Nakhwa, i.e. the husband of the petitioner no.1 and the father of the respondent no.2. According to the respondent, Hari Nakhwa had left behind him one more son by name Kedar Hari Nakhwa and since Kedar was not joined as party to the suit, the suit was liable to be dismissed on the ground of non joinder of a necessary party. The respondent also denied that he was in arrears of rent for a period of more than six months and claimed that he had paid the rent but the respondents had not issued the rent receipts for the

rent paid. Therefore, the respondent contended that he was not in arrears of rent for a period of more than six months and was not a defaulter.

4. The trial Court held that the suit was not bad for non joinder of necessary parties. It is not disputed that the petitioners are the heirs of Hari Nakhwa. The only contention is that Hari Nakhwa has left behind him one more heir and the petitioners are only the co-owners. It is settled position in law that a co-owner is entitled to file a suit for possession under a Rent Act without joining other co-owners as parties to the suit. The trial Judge has rightly held that the suit did not suffer from non joinder of necessary parties and the finding is affirmed.

5. In the written statement, the respondent also contended that rent of Rs.25/- was excessive and exorbitant and was not the standard rent. It is also settled position that a dispute as to the standard rent cannot be raised by filing of a written statement in the landlord’s for possession. Such a contention has to be raised by filing an application for determination of standard rent

within a period of one month from the date of receipt of the notice in order to claim protection under section 12(3)(b) of the Bombay Rent and Lodging Houses Rates Control Act 1947 (for short 'the Act') The trial Court did not believe the case of the respondent that he was not in arrears of rent and therefore, passed a decree for possession under section 12(3)(a) of the Act.

6. The aggrieved respondent filed an appeal. During the pendency of an appeal, the act was amended by Maharashtra Act no. XVIII of 1987. Under the said amendment, sub section (3) of section 12 was substituted by a new sub section. The amended sub-section(3) says that if on the first day of the hearing of the suit on or before such other date as the Court may fix, the tenant pays or tenders in the Court the standard rent and permitted increases then due with simple interest on the amount of arrears of standard rent and permitted increases at 9% p.a. and thereafter, continued to pay or tender in the Court regularly such standard rent and permitted increases till the suit is finally decided and also pay the costs of the suit as directed by the Court, then the Court shall not

pass a decree for eviction on the ground of non payment of arrears of rent and permitted increases. Relying on this amendment, the appellate Court held that as the respondent had paid in the Court arrears of rent before the first day of hearing and he was entitled to a protection under the amended sub section (3) of section 12. In view of the amendment to sub section (3) of section.12, the appellate Court allowed the appeal. The appellate Court at the first instance did not consider an issue as to whether amendment to sub-section(3) of section.12 applies retrospectively and confers a protection to a tenants against whom the suit for possession was filed on the ground of default before the amendment. The petitioner by filing of a Review Petition contended that the Court had not considered the issue as to whether sub section (3) of section12 was retrospective, and that amendment to sub section (3) of section 12 was not retrospective in operation and did not apply to a suit for possession filed on the ground of default before the amendment of sub section(3) of section 12. The Court held that even an erroneous decision was not necessarily a ground for review and the fact that sub section (3) of section 12 was not retrospective in operation was no

ground for reviewing of its earlier judgement.

7. The learned Counsel for the petitioner referred to a decision of this Court rendered in Piroja M. Mehta Vs. Dr.Hambai Jamshedji Cama & ors. reported in 1988(3) Bombay Cases Reporter 1. In the said decision, this Court has laid down that sub section (3) of section 12 of the Act as amended by Maharashtra Act no.XVII of 1987 is not retrospective in operation and that sub-section (3) does not apply to a suit for possession filed on the ground of default before October 1, 1987 whenthe amendment was brought into force. No decision taking a contrary view is cited by the learned counsel for the respondent. In view of the fact that sub section (3) of section 12 of the Act is not retrospective in operation, the learned District Judge erred in applying the provisions of amended sub section (3) of section 12. It is not disputed that if the position if to be considered as per the law as it existed prior to the amendment with effect from 1st October 1987, the respondent’s case falls under clause(a) of sub section (3) of section 12 of the Act. The respondent was in arrears of rent for a period of more than six months and had failed and

neglected to pay the arrears of rent within one month from the date of receipt of the notice of demand. In such circumstances, there was no alternative for the Court but to pass a decree for possession. Hence, the impugned judgements cannot be sustained.

8. Accordingly, petition is allowed. The impugned judgement and order passed in Appeal no. 377/85 and Review Application bearing Misc. Application no. 138/90 are set aside and the judgement and order dated 15th July 1985 passed by the learned 2nd Joint District Judge, Thane in regular Civil Appeal no.581 of 1981 is restored.

9. Rule made absolute. In the circumstances, there shall be no order as to costs.

D.G. KARNIK, J